Supreme Court, U. S.
FILED
JUN 2 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

LARRY D. JONES,

Appellee.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

BRIEF OF THE APPELLANTS

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BRIEF OF THE APPELLANTS

OPINION BELOW

The original opinion of the United States District Court for the District of Nebraska is reported in 437 F. Supp. 569; the re-entry of the original judgment is unreported.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3) and (4), and 28 U. S. C. §§ 2201 and 2202 for declaratory relief that Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and attendant injunctive relief.

A three-judge district court was convened below pursuant to 28 U. S. C. § 2281, which was repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 but which repeal was not applicable to any action commenced on or before August 12, 1976. The present action was commenced on November 12, 1975.

Probable jurisdiction was first noted by this Court on February 21, 1978 and oral argument was had in this Court on April 24, 1978.

On May 23, 1978 this Court vacated the judgment entered October 14, 1977 and remanded the case to the District Court for consideration of the question of mootness (*Vitek v. Miller,* 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381.)

On October 27, 1978 the District Court entered a Memorandum of Decision that the case was not moot and re-entered the same judgment as the one previously vacated.

Jurisdiction to review by direct appeal the judgment of the United States District Court is conferred by 28 U. S. C. § 1253.

Notice of Appeal was filed in the United States District Court for the District of Nebraska on November 21, 1978, to the final judgment sought to be reviewed entered October 27, 1978.

Appeal was docketed in the United States Supreme Court on January 22, 1979. Review was granted April 23, 1979.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) United States Constitution, Fourteenth Amendment

[ARTICLE XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one

years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(2) Neb. Rev. Stat. § 83-173 (Reissue 1976)

The Director of Correctional Services shall:

(1) Supervise and be responsible for the administration of the Department of Correctional Services;

(2) Establish, consolidate, or abolish any administrative subdivision within the department and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the department and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the department, sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the department and to raise and maintain the educational standards and the level of performance of such employees;

(10) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the department for the preceding cal-

endar year, which report shall be transmitted by the Governor to the Legislature; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities.

(3) Neb. Rev. Stat. § 83-176 (Reissue 1976)

(1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, or any other facility designed primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

(4) Neb. Rev. Stat. § 83-179 (Reissue 1976)

Upon his initial admission to a facility, each person committed to the department shall be given a physical examination and a thorough evaluation. He shall be kept apart from other persons committed to the department until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

(5) Neb. Rev. Stat. § 83-180 (Reissue 1976)

(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in, such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Department of Correctional Services, and shall be returned to the department when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

(3) When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

(6) Neb. Rev. Stat. § 81-101 (Reissue 1976)

The civil administration of the laws of the state is vested in the Governor. For the purpose of aiding the Governor in the execution and administration of the laws, the executive and administrative work shall be divided into the following departments: (1) Department of Agriculture; (2) Department of Labor;

(3) Department of Health; (4) Department of Roads; (5) Department of Water Resources; (6) Department of Banking and Finance; (7) Department of Insurance; (8) Department of Motor Vehicles; (9) Department of Public Welfare; (10) Department of Public Institutions; (11) Department of Administrative Services; (12) Department of Economic Development; and (13) Department of Correctional Services.

(7) Neb. Rev. Stat. § 81-102 (Reissue 1976)

The Governor shall appoint heads for the various departments, subject to confirmation by a majority vote of the members elected to the Legislature. Such appointments shall be submitted to the Legislature within sixty calendar days following the first Thursday after the first Tuesday in each odd-numbered year. The officers shall be designated as follows: (1) The Director of Agriculture for the Department of Agriculture; (2) the Commissioner of Labor for the Department of Labor; (3) the members of the State Board of Health for the Department of Health; (4) the Director-State Engineer for the Department of Roads; (5) the Director of Water Resources for the Department of Water Resources; (6) the Director of Banking and Finance for the Department of Banking and Finance; (7) the Director of Insurance for the Department of Insurance; (8) the Director of Motor Vehicles for the Department of Motor Vehicles; (9) the Director of Public Welfare for the Department of Public Welfare; (10) the Director of Public Institutions for the Department of Public Institutions; (11) the Director of Administrative Services for the Department of Administrative Services; (12) the Director of Correctional Services for the Department of Correctional Services; and (13) the Director of Economic Development for the Department of Economic Development. Whoever shall be so nominated by the Governor and shall fail to receive the number of votes requisite for confirmation, shall not be subject to

nomination or appointment for this or any other appointive state office requiring confirmation by the Legislature during the period for which his appointment was sought. In case of a vacancy in any of such offices during the recess of the Legislature, the Governor shall make a temporary appointment until the next meeting of the Legislature, when he shall nominate some person to fill such office. Any person so nominated who is confirmed by the Legislature, shall hold his office during the remainder of the term if a specific term has been provided by law, otherwise during the pleasure of the Governor subject to the provisions of this section; *Provided,* any such officers may be removed by the Governor pursuant to Article IV of the Constitution of Nebraska.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a constitutionally convicted felon who has been sentenced to the Nebraska Department of Correctional Services has any process due prior to his transfer from the penitentiary, to which he has been assigned within said department, to a mental hospital within the Department of Public Institutions of the State of Nebraska, when confinement in said hospital is within the sentence imposed upon him?

2. If process is due under question 1, what procedures are required by the Fourteenth Amendment of the United States Constitution in these circumstances?

—o—

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343(3) and (4), 28 U. S. C. § 2201 and 28 U. S.C. § 2202, in which Larry D. Jones intervened. It was decided by a three-judge court by judgment entered on October 14, 1977, pursuant to a Memorandum of Decision and order entered on September 12, 1977. The issues were found to be moot as to the plaintiffs other than Jones.

Prior to that, on August 2, 1976, defendants filed a motion for summary judgment (A. 25), which was denied by the court on August 24, 1976 (A. 26). Defendants' request for amendment of the order to permit an interlocutory appeal was denied (A. 31).

Plaintiff-intervenor, Larry D. Jones (appellee), was convicted of the crime of robbery and sentenced to the Department of Correctional Services of the State of Nebraska for a term of three to nine years from the District Court of Douglas County, Nebraska, which he commenced serving at the Nebraska Penal and Correctional Complex on or about May, 1974 (R. 73). He first began to serve his sentence by assignment to the reception-diagnostic center behind the walls of the Nebraska Penal Complex for a period of 30 days (R. 73). After that he went to the reformatory where he remained from June of 1974 to January of 1975 (R. 73, 74). He was then transferred to the Penal Complex penitentiary hospital and two days later to the adjustment center of the Nebraska Penal Complex. While there, he set his mattress on fire and was badly burned. He was transferred from the Nebraska Penal Complex by ambulance to St.

Elizabeth's Hospital, burn unit, a hospital in the City of Lincoln, where he remained for about four or five months (R. 75, 112, 113). From the St. Elizabeth's Hospital he was involuntarily transferred after findings by physicians in compliance with Neb. Rev. Stat. § 83-180(1) (Reissue 1976), *supra*, to the security unit of the Lincoln Regional Center (R. 76-78). The Lincoln Regional Center is under the Department of Public Institutions while the Nebraska Penal Complex is under the Department of Correctional Services. Both are executive departments of the State of Nebraska (Neb. Rev. Stat. § 81-101 (Reissue 1976)). The directors of both departments are appointed by the Governor of the State of Nebraska (R. 58), (Neb. Rev. Stat. § 81-102 (Reissue 1976)).

Neb. Rev. Stat. § 83-180 (Reissue 1976), provides in part that if the physician or psychologist designated by the Director of Correctional Services finds that a person suffering from a mental disease or defect cannot be given proper treatment in a facility of the department, the director may arrange for his transfer for examination, study and treatment to any medical correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to expiration of his sentence, treatment in such facility is no longer necessary.

In addition to Neb. Rev. Stat. § 83-180 (Reissue 1976), *supra*, other statutes of Nebraska also provide that:

(1) The Director of the Department of Correctional Services shall designate the place of confinement of persons committed to the department (Neb. Rev. Stat. § 83-173 (Reissue 1976)).

(2) Whenever a person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden, he shall be deemed to be sentenced to the department. The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another (Neb. Rev. Stat. § 83-176 (Reissue 1976)).

(3) Upon his initial admission to the facility each person committed to the department shall be given a thorough evaluation, including physical, psychological, social, educational and vocational. A report shall be made including recommendations regarding the facility to which such person should be assigned and the program of treatment for his rehabilitation, including medical and psychological treatment (Neb. Rev. Stat. § 83-179 (Reissue 1976)).

The said Larry D. Jones intervened in the present action alleging that Neb. Rev. Stat. § 83-179 (Reissue 1976) and Neb. Rev. Stat. § 83-180 (Reissue 1976), *supra*, are unconstitutional on their face and as applied by the defendants because, among other things, they deprive intervening plaintiff of due process of law in violation of the Fourteenth Amendment to the United States Constitution (A. 23).

That the conditions of confinement or the facilities of the Lincoln Regional Center security unit, or any other facilities here involved, were in themselves unconstitutional has never been an issue in this case nor been so determined. The three judge court however, decreed:

> That Neb. Rev. Stat. § 83-180(1) (Reissue 1976), *supra*, is unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law; that defendants (appellants) are enjoined from transferring plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal charge he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes substantially the same elements as provided by this court in *Morrissey v. Brewer*, 408 U. S. 472 (1972), and *Wolff v. McDonnell*, 418 U. S. 539 (1974), except for the addition that the state must also furnish legal counsel if the inmate is financially unable to furnish his own and the state must give effective and timely notice of all the foregoing rights. (Jurisdictional Statement, App. 18-20).

While this case was on Appeal to the U. S. Supreme Court the first time, Larry D. Jones was granted a limited parole to receive in-patient treatment at a V. A. hospital in Danville, Ill. In light of this the U. S. Supreme Court remanded the case to the U. S. District Court for consideration of the question of mootness. (*Vitek v. Miller*, 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381.) On October 27, 1978, the three-judge district court found the case was not moot (Jurisdictional Statement Appendix A). Larry D. Jones is now back in the confines of the Nebraska Penal and Correctional Complex having been arrested in Arizona in November 1978, on a Parole Board Warrant issued October 4,

1978. His parole was revoked by the Nebraska Parole Board after a final hearing on January 8, 1979 (Jurisdictional Statement App. Ex. H).

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SUMMARY OF THE ARGUMENT

I.

The three-judge court found the transfers to come within an exception to *Meachum v. Fano*, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532, and *Montanye v. Haymes*, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 543, because of a state statute which it said gave the inmate a reasonable expectation that he would not be transferred "except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex." (Memorandum of Decision, Jurisdictional Statement, App. 4, 7).

The statute did not so state. The statute states, in this regard, "If the physician or psychologist is of the opinion that the person (found by the physician or psychologist to suffer a mental disease or defect) cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study and treatment. . . ." Neb. Rev. Stat. § 83-180 (Reissue 1976).

There was never any claim that the statute was not followed. Therefore, any right the inmate had by virtue of the statute was given to him.

The court did not find that the transfer was not within the prison system or that the conditions to which plaintiffs were transferred were otherwise unconstitutional.

Therefore, the exception or "specified conditions" of *Meachum* and *Montanye* were not alleged to have been violated, leaving the transfers within the holdings of those cases. The defendants motion for summary judgment should therefore have been sustained.

The situation here is different in two respects from this court's holdings in other cases that a due process proceeding was necessary before a state conferred right could be removed.

1. The method of determining the facts upon which removal of the right hinged was left open when the state conferred the right in those cases; here it was not.

2. The method of determining misconduct—the trigger in those cases, should logically be different from the method of determining the availability and need for examination, study and treatment of mental illness.

II.

The examination, study and diagnosis of illnesses, whether mental or physical, are an integral part of prison life and the transfer from a prison to a mental hospital should be treated the same as transfers between correctional institutions in *Meachum v. Fano* and *Montanye v. Haymes*. Because of the Nebraska statute, Neb. Rev. Stat. § 83-180 (Reissue 1976), the officials do not have absolute discretion to make such transfers as in *Meachum* and *Montayne*. However, because of the nature of the determination to be made, that a transfer, if made, is for examination and study as well as treatment, the provision of the statute placing the responsibility upon a health care professional to make the determination whether the inmate

can be given proper treatment where he is or should be transferred for examination, study and treatment is reasonable and proper. If the district court, by setting up its own procedures, was in effect holding that the Nebraska statutory method was improper, we vigorously disagree.

Because of the great variety of both physical and mental health services throughout the United States as to the availability, quality and other considerations and the expertise necessary in diagnosis and selection, the provision in the Nebraska statute for placing the responsibility for the initial determination is not unreasonably placed in the hands of the health care professional.

The type of due process hearing which is proper for determining misconduct is ill-suited, cumbersome, time-consuming and expensive for the determination of whether an inmate should be moved for further study and diagnosis for mental illness or related medical problems.

If problems arise in regard to the programs or services received, they can more directly and logically be attacked by an action to test the constitutionality of the conditions and to seek suitable relief rather than a blanket procedure which has no relationship to the quality or type of programs involved or available in various parts of the country.

The Nebraska statute in question specifically provides for the use of the civil procedures applicable to all citizens if an inmate is to be placed in a mental institution after the expiration of his prison sentence and thus no equal protection issue is involved.

———o———

ARGUMENT

I.

The only conditions for transfer, if any, in the statute in question are the findings to be made by the physician or psychologist.

The three-judge court in the present case founded its decision that process was due on its interpretation of the Nebraska statute which it held to be unconstitutional and its finding that the prison penal authorities followed this statute.

The three-judge court began by quoting from *Montanye v. Haymes*, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543, the following:

> "We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other *specified events.*" (Emphasis added.)

The three-judge court then distinguished the Nebraska statute on transfers to the Lincoln Regional Center concluding that:

> " . . . , there was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex. . . . " (Jurisdictional Statement, App. 7-8).

The three-judge court ignored the fact that the statute and the practice thereunder required the findings to be

made by a physician or psychologist designated by the director and not by some unnamed person or body. Therefore, the inmate, instead of having a justifiable expectation rooted in state law that he will not be transferred, as stated by the district court, clearly had an expectation that he may be transferred if the physician or psychologist, not some unnamed person or body, found that he suffered from a mental disease or defect not properly treatable in the facility he was presently in.

There is just no logical way that it can be said that a Nebraska penal inmate has an objective expectation that a transfer would not occur until after a due process hearing when the statute specificially states that a transfer may occur when the stated findings are made by a physician or psychologist—clearly the "specified events" when he may expect to be transferred as stated in the quote above from *Meachum.*

Nor is the situation here in any way akin, so far as taking away a due process clause liberty interest, to *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (parole), *Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (probation), or *Wolff v. McDonnell*, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (good time), all of which were based upon the taking away of a positive grant of liberty affirmatively conferred by state law. The liberty interests, unlike *Meachum* and *Montanye* were not extinguished by the conviction but acquired independently thereof. In *Morrissey v. Brewer* this court found that:

> " . . . Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confine-

ment in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. . . . " *Morrissey v. Brewer*, 408 U. S. 471 at 482.

No similar comparison could be made in this case.

In *Gagnon v. Scarpelli* this court could not perceive any relevant differences to the guarantee of due process between the revocation of parole and the revocation of probation and found that:

" . . . Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. . . ." *Gagnon v. Scarpelli*, 411 U. S. 778 at 782.

In *Wolff v. McDonnell* the statutory grant of good time credit was found to be a liberty interest with real substance which the Nebraska statute specifically provided could not be taken away except in cases of flagrant or serious misconduct—thus a liberty interest firmly grounded in state law. The statute did not provide how the factual finding as to serious misconduct would be made, hence the due process hearing. Had the statute provided a fact finding procedure, the court might have concluded that no further process was due; in any case, as argued infra, there is a significant difference between the qualifications desirable for ascertainment of medical facts as opposed to the facts of misconduct.

The distinction, between the *Meachum-Montanye* transfers on the one side, and the part of *Wolff v. McDonnell* relating to disciplinary cells and the recent case of *Enomoto v. Wright* (Aff. w/o opinion February 21, 1978, — U. S. —, U. S. L. W. 3513), regarding administrative segregation, on the other side, is not as fine as may appear at first reading.

In both *Meachum* and *Montanye* this court emphasized that where the prison officials had discretion to transfer within the system, or could transfer for no reason at all, that the due process clause was not triggered even if the transfer was for disciplinary purposes or labeled as punitive. However, in both *Wolff v. McDonnell* and *Enomoto v. Wright*, the transfer could only be made for specific grounds set forth in a state statute or state administrative rule. In *Wolff* the same statute relating to revocation of good time applied to placement in a disciplinary cell, i. e. only for flagrant or serious misconduct. In *Enomoto* the administrative segregation could only be made for medical, psychiatric, disciplinary or administrative reasons which had to be clearly documented at the time the action was taken. Thus in both the latter two cases there were factual determinations required before the transfer and the method of determining the factual requirements was left open by the state law conferring the right.

Appellants in the present case could reasonably argue that other Nebraska statutes give the Director of Corrections the discretion to transfer to a mental hospital for no reason at all and that therefore, even if the statute in question requires the findings therein set forth that the director is not limited thereby. However, we do not wish, nor do we feel it is necessary, to place the transfer on such a narrow ground. We are willing to place the transfer

upon the findings required by the section in question; our only difference with the three-judge court is that the statute (and therefore any right of the inmate which is grounded in state law) ties the findings to the physician or psychologist and that such a procedure, as argued later, is reasonable and proper. That any right the inmate has because of such statute is clearly stated and conferred and cannot be separated; that the three judge court erred in changing that right from requiring the necessary findings to be made by the physician or the psychiatrist to such findings being required to be made by court designated procedures. (The district court did not hold that the mental hospital was not part of the penal system. Memorandum of Decision, Jurisdictional Statement, App. 7.)

Accordingly, since the complaints herein (A. 3, A. 18) only claim that the statute, section 83-180, *supra*, is unconstitutional on its face and that defendants followed this statute in practice, the motion for summary judgment (A. 25) filed by the defendants should have been sustained.

II.

The responsibility for the determination of the need for medical care is properly placed in health care professionals.

The only discernible difference between the present case (besides the necessary physician or psychologist findings) and *Meachum* and *Montanye* is that the transfer in the present case was to a state mental hospital authorized for use by the state correctional statutes, while in the foregoing cases the transfers were to nonhospital correctional facilities. Appellants respectfully contend that this

is a difference without legal substance so long as the hospital facilities are not otherwise violative of the Constitution and are within the state system contemplated by the criminal sentence.

Apparently the district court agreed that there was no legal significance in the difference in facilities, stating in its memorandum of decision:

> "The plaintiffs here were not transferred from one 'prison' to another but from a prison to a state mental hospital for both a continuation of their prison terms and for mental treatment. The prison and the hospital properly may be equated for due process purposes. . . . " (Jurisdictional Statement, App. 7).

In *Meachum v. Fano*, 427 U. S. 215 at 224, 49 L. Ed. 2d 451, 96 S. Ct. 2532, this court clearly set out the reasons underlying the constitutionality of transfers by emphasizing that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the constitution." In the same case the court went on to point out that the Constitution does not guarantee that a convicted prisoner will be placed in any one particular prison if the state has more than one correctional institution; that the conviction has sufficiently extinguished the defendant's liberty interest to empower the state to confine him in any of its prisons or to transfer him from one institution to another within the state prison system.

So far as we know, neither this court nor any recognized authority on corrections, has ever stated that a prison or correctional facility must or must not have hos-

pital or medical facilities including mental health facilities at any particular location. (Appellee Jones while in the Nebraska Penal and Correctional Complex received medical treatment from a psychiatrist while he was in the reformatory unit (R. 79), and at the prison hospital in the penitentiary unit (R. 99), which housed both psychiatric and medical patients (R. 157), and treatment for burns at St. Elizabeth's Hospital in Lincoln (R. 75) before he was transferred to the mental hospital.)

We assume that the programs available in the various correctional institutions throughout the United States are considerably varied in kind and degree. Undoubtedly some offer more in the way of recreational, manual training, or academic programs than others. Probably some provide relatively complete medical services within the institution while others must contract with outside physicians and hospitals for all or nearly all. The same as to availability and variety of programs is undoubtedly true as to mental health facilities.

The National Advisory Commission on Criminal Justice Standards and Goals in its volume, *Corrections*, released in 1973, in discussing these problems, stated in part as follows:

> "3. Each correctional agency should provide for the psychiatric treatment of emotionally disturbed offenders. Psychotic offenders should be transferred to mental health facilities. Correctional institution treatment of the emotionally disturbed should be under the supervision and direction of psychiatrists."

The commentary thereof provides in part:

> "As psychiatric services for diagnostic purposes became available in some correctional systems, the

> response of the correctional systems was to transfer the most seriously disturbed offenders to mental institutions. This decision was motivated by the fact that a large proportion of highly disturbed offenders were prone to violent and destructive behavior and highly oriented toward escape. However, as State mental hospitals developed 'open institutions,' they began to discourage admission of disturbed offenders for whom more secure facilities were required. . . .
>
> " . . . .
>
> "The correctional institution should not attempt to treat the psychotic but must persist in efforts to persuade mental health agencies to accept him for care and treatment. . . . " Standard 11.5 of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, 374, 376.

More recently, in August, 1977, the Commission on Accreditation for corrections of the American Correctional Association has published its *Manual of Standards for Adult Correctional Institutions*. The manual states that the commission not only promotes voluntary participation of correctional administrators and personnel in the accreditation process but also awards accreditation to correctional agencies and systems that demonstrate adherence to approved standards; the Commission on Accreditation will award accreditation to correctional systems for three or five years depending upon the extent of compliance with the standards.

In the section of Standards for Medical and Health Care Services is the following:

> **"4277 Written policy specifies that appropriate facilities are available for inmates who are diagnosed by qualified psychiatrists or psychologists as severely psychotic. (Essential)**

"DISCUSSION: Psychotic inmates should be transferred to mental health institutions. However, many state mental hospitals are becoming more open and are resisting the admission of disturbed inmates for whom secure housing is required. Partly in response to this, state correctional systems have begun to develop their own psychiatric facilities. Whatever system prevails, psychotic inmates should be transferred to a facility that can treat them effectively and assure public safety. These facilities must be under the supervision of mental health personnel and operated according to the standards and procedures of the psychiatric field."

As to emotionally disturbed inmates, Standard 4275 recognizes that emotionally disturbed inmates may be violent or destructive or prone to escape. It recommends that severely psychotic inmates should be transferred to state hospitals and less disturbed inmates should be retained in the general population where possible, provided treatment programs supervised by competent mental health professionals utilizing the least coercion necessary are available.

The foregoing standards and recommendations clearly demonstrate that treatment for mental and emotional problems is a vital part of a prison. They also illustrate the futility and inappropriateness of requiring a due process hearing before a transfer for mental health services when no such hearing is required when the services are provided at the inmate's location. Enlarge the problem by including other logical health services and the impropriety of such a requirement becomes even more obvious. Such a weighted preference for in-house care ignoring completely the availability and quality of services as criteria would avail no one. Whether the question is the

advisability of surgery for a brain tumor, chemotherapy for cancer or treatment for mental illness, one of the main questions of the patient would be the same in each case—whether such treatment is necessary and proper? The inmate is entitled to reasonable medical diagnosis in such regard and the Nebraska statute in question, section 83-180, makes specific provision for this interest. The section provides in part:

". . . If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for *examination, study, and treatment* to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. . . ." (Emphasis added.)

The last sentence of said section further provides that the inmate shall be returned when "treatment in such facility is no longer necessary." We can't assume that the doctors making such examination and study will provide unnecessary treatment and that they will not comply with the statute and fail to return the inmate when treatment is no longer necessary. This is the same standard we would expect for an inmate sent into a private hospital for a brain tumor or cancer diagnosis and treatment. As mentioned above, most persons would undoubtedly agree that the inmates' interests in such regard are better protected in most cases if he is transferred for another opinion before treatment is undertaken than if treatment is given, for any of the above examples, right in the prison. At any rate, it cannot be said that it is any worse. Logically, whether or not the inmate has had a hearing before a lay board should not make any difference to the examining

doctors on the receiving end in their determination as to what treatment, if any, is necessary.

In addition to the foregoing, considering that all inmates have a constitutional right to reasonable medical treatment, including mental health treatment, and the need to maintain order in the prisons, overburdensome procedures which could conceivably constitute roadblocks in their receiving treatment should not be instituted either. The opportunity for the best consultation as to the need and kind of medical services available should remain the prime objective and the use of professionals for referral to more professionals would seem to be a logical and reasonable accommodation to all interests.

In this respect, the statement by this court in the recent case of *Addington v. Texas,* — U. S. — (April 30, 1979), 39 CCH S. Ct. Bull. p. B2270 at B2282 concerning the quantum of proof necessary for civil commitment is apropos:

> "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for 'factfinding' is a 'reasonable medical certainty.' If a trained psychiatrist has difficulty with the categorical 'beyond a reasonable doubt' standard, the untrained lay juror—or indeed even a trained judge—who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. . . . "

This court then made the further observation which, if paraphrased to fit the circumstances of this case, would be equally appropriate; it stated:

> " . . . However, '[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' Patterson v. New York, 432 U. S. 197, 208 (1977). Nor should the state be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commiments.
>
> " . . . The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. . . . "

Of course, it could be argued that absent any statute the right not to have mental health treatment, except when disturbance to other inmates and dangers to security are involved, is one of those residuums of liberty not extinguished by the due process conviction and sentence such as substantial religious freedom. *Cooper v. Pate,* 378 U. S. 546, 12 L. Ed. 2d 1030, 84 S. Ct. 1733 (1964). However, such an approach does not logically distinguish between the examples mentioned above such as a right not to receive cancer treatment or serious surgery. Even if there is considered to be such a residuum, the initial decision to refer a patient for study and examination to see whether

or not such treatment should be received is nevertheless better handled for all interests concerned by a medical health professional than by a proceeding before a lay committee.

In this regard we must strenuously disagree with the three judge court in its Memorandum of Decision contained in the Jurisdictional Statement, App. 4, at App. 9, where it sets forth how it arrived at the procedures it deemed required. While the court recognized that "the state's interest in placing a mentally ill person into the institution best equipped to treat him is strong and deserves primacy . . ." the court did nothing to follow through on this. The procedures for fact finding relating to violations, whether it be for revocation of parole, of probation, or good time, or for placement in a disciplinary cell, are particularly ill-suited to the question of transfer for medical or mental health reasons. The latter, requiring as they must, expert opinion evidence, the investment in time, expense and inconvenience in preparing for and conducting such hearings would seem to be way out of proportion to the result to be obtained when compared with the methods already suggested. The requirement by the district court wholly without precedent of appointment of legal counsel when an inmate is financially unable, in excess of the requirements of *Morrissey, Gagnon* and *Wolff,* dramatically illustrates the increase in money and activity which may be expected. It would seem that the emphasis should be upon the constitutionality of the conditions to which an inmate is to be subject, whether in a physical or mental health situation, rather than upon the procedures to place him there. An inmate, of course, retains his right to bring a civil rights action for unconstitutional conditions, for reasonable medical services and, under the Nebraska statute in question, to require transfer back to the correctional institution when treatment is no longer necessary.

As mentioned earlier, when the entire spectrum of mental health facilities in this country is considered, the emphasis upon the pre-transfer procedure rather than upon the constitutionality of the conditions either before or after a proposed transfer would appear to miss the mark in most cases.

Equal Protection Considerations.

Although the district court alluded to possible equal protection problems mentioning *Baxtrom v. Herold,* 383 U. S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760, we do not believe that said case is any authority or precedent to the present situation. As this court well knows, that case related to the procedures for the commitment of a prison inmate to a mental institution after his prison term expired. In *Humphrey v. Cady,* 405 U. S. 504, 31 L. Ed. 2d 394, 92 S. Ct. 1048, this court followed the *Baxtrom v. Herold* reasoning by holding that it applied to a claim that a five-year renewal of a sex deviate commitment after the expiration of his one-year maximum sentence stated a cause of action. In that same case this court emphasized:

> "Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex

Crimes Act, which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence. . . ." *Humphrey v. Cady,* 405 U. S. 504 at 510, 511.

The problem raised in both *Baxtrom v. Herold* and *Humphrey v. Cady,* as to equal protection after the expiration of a prison sentence is specifically taken care of in the statute in question, § 83-180(3), *supra,* which provides:

> "When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the *civil commitment* and detention of persons suffering from such disease or defect." (Emphasis added.)

CONCLUSION

The appellants respectfully submit that Neb. Rev. Stat. § 83-180 (Reissue 1976), is a reasonable, proper and constitutional method of determining whether or not prison inmates should receive further examination, study and treatment in the location in which they are or another correctional facility housing medical services, or to another institution in the Department of Public Institutions where proper treatment is available; the district court found that the officials followed this statute. Appellants therefore respectfully submit that any constitutional right that

appellee Jones may have had which was not extinguished by his conviction and sentence, whether by virtue of § 83-180 or as a residuum retained, was satisfied by the findings of the professionals as required by said statute and that therefore appellants' motion for summary judgment should have been sustained. Appellants respectfully pray that the three judge district court for the District of Nebraska be reversed and the case remanded with instructions to enter an order sustaining the appellants' motion for summary judgment and dismissing the complaint of appellee Jones.

Respectfully submitted,

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